



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 25, 2004

Ms. Mary Winston  
Public Information Officer  
Texas Savings & Loan Department  
2601 North Lamar, Suite 201  
Austin, Texas 78705

OR2004-9068

Dear Ms. Winston:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 211507.

The Texas Savings & Loan Department (the "department") received a request for information pertaining to specified "mortgage broker individuals and/or mortgage brokering companies" from 1999 to the present. The requestor subsequently excluded fingerprint information and social security numbers from the requested information. Thus, such information is not responsive to the present request and this ruling will not address that information. You also state that the department does not have any information related to the mortgage brokering companies or to two of the individuals named in the request. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.110, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). You state that the request for information was received in the department's central mail facility on July 19, 2004. In this regard, we note your assertion that you, in your role as the department's public information officer, did not receive the request until August 6, 2004. Therefore, we conclude that the department did in fact receive the public information request on July 19, 2004. *See* Open Records Decision Nos 497 (1988) (Act does not require that member of public actually name chief administrative officer of governmental body in order to make valid request for information under Act; request is valid so long as it reasonably can be identified as request for public records), 44 (1974) (where request has been directed to responsible person in position of authority, governmental body cannot ignore request simply because it may not have been directed to legal custodian of records). As such, the ten-business-day deadline fell on August 2, 2004, and the fifteen-business-day deadline was August 9, 2004. Because the department did not request a decision pursuant to section 552.301(b) nor submit the information required by section 552.301(e) until August 19, 2004, it failed to meet the deadlines prescribed by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists when some other source of law makes the information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because the assertion of sections 552.101, 552.110, 552.130, and 552.137 of the Government Code provide compelling reasons to overcome the presumption of openness, we will address your arguments.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential under other statutes, such as section 156.301 of the Finance Code. Section 156.301 provides in relevant part:

(b) On the signed written complaint of a person, the commissioner shall investigate the actions and records of a person licensed under this chapter if the complaint, or the complaint and documentary or other evidence presented in connection with the complaint, provides reasonable cause. The commissioner, before commencing an investigation, shall notify a mortgage broker or loan officer in writing of the complaint and that the commissioner intends to investigate the matter.

...

(f) Information obtained by the commissioner during an inspection or an investigation is confidential unless disclosure of the information is permitted or required by other law.

You indicate that the department obtained the submitted information in Exhibit 3 during investigations of complaints under section 156.301. You do not inform this office, and we are not otherwise aware, of any other law that permits or requires disclosure of the submitted information. Accordingly, we conclude that the department must withhold the submitted information in Exhibit 3 under section 552.101 of the Government Code in conjunction with section 156.301(f) of the Finance Code as information made confidential by law.

Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming that the department has CHRI about the applicants in its possession and it falls within the ambit of these state and federal regulations, the department must withhold the CHRI from the requestor.

Section 552.101 of the Government Code also excepts information made confidential under common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is confidential under common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, that common law privacy is designed primarily to protect human feelings and sensibilities, rather than to safeguard property, business, or other pecuniary interests. See Open Records Decision No. 192 at 4 (1978); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). We have marked the information within the submitted records in Exhibit 2 that is confidential under common law privacy, and must be withheld pursuant to section 552.101.

You assert that the "company financial information" contained in Exhibit 2 is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. Cf. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. See Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Based on our review of your arguments and the submitted information, we find that the department has failed to adequately demonstrate that any portion of the submitted information constitutes commercial or financial information, the release of which would cause a third party substantial competitive harm. See generally Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 509

at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under predecessor to section 552.110), 184 (1978). Accordingly, we conclude that the department may not withhold any portion of the submitted information under section 552.110(b) of the Government Code.

You also assert that section 552.130 of the Government Code is applicable to some of the submitted information in Exhibit 2. Section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. We have marked the type of information in the submitted documents that the department must withhold pursuant to section 552.130.

The submitted information in Exhibit 2 also contains e-mail addresses, which you contend are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a business's general e-mail address. In addition, e-mail addresses that are encompassed by subsection 552.137(c) are not excepted from disclosure under section 552.137. You inform us that the department has not received affirmative consent for the release of e-mail addresses that are contained within the submitted information. Based on our review of your representations and the submitted information, we find that most of the e-mail addresses that you have marked are encompassed by section 552.137(a). We have marked the general business e-mail addresses that are not excepted by section 552.137, and therefore must be released. The department must withhold the remaining marked e-mail addresses pursuant to section 552.137(a) of the Government Code.

Finally, we note that some of the submitted information is excepted from release under section 552.136 of the Government Code. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The department must withhold the marked check routing and account numbers under section 552.136.

To summarize, the department must withhold the submitted information in Exhibit 3 under section 552.101 of the Government Code in conjunction with section 156.301(f) of the Finance Code. To the extent that the department has CHRI about the applicants in its possession and it falls within the ambit of the applicable state and federal regulations, the department must withhold the CHRI from the requestor. We have marked the information within the submitted information in Exhibit 2 that is confidential under common law privacy, and must be withheld pursuant to section 552.101. We have marked the type of information in the submitted documents that the department must withhold pursuant to section 552.130. Except for the general business e-mail addresses that we have marked for release, the department must withhold the marked e-mail addresses pursuant to section 552.137(a) of the Government Code. The marked check routing and account numbers must be withheld under section 552.136. The remaining submitted information must be released to the requestor.

You also ask this office to issue a previous determination authorizing the department to withhold personal information of licensees and information acquired during an investigation under section 156.301 if requested in the future. We decline to issue such a previous determination at this time. Thus, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

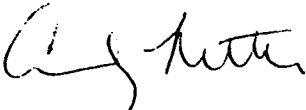
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 211507  
Enc. Submitted documents

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